Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LICK FORK MARINA, INC.,
Petitioner,

V.

STATE OF INDIANA,
Respondent.

On Petition For Writ of Certiorari
To The Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has the State of Indiana, through inverse condemnation, in violation of the Indiana and United States Constitutions, taken trade fixtures and personal property from one of its citizens, without compensation of any kind, contrary to the rule first enunciated by this Court in *Van Ness v. Pacard*, 27 U.S. 137 (1829) that trade fixtures are personal property and not real property and removable by a lessee at any time before the expiration of a leasehold; in a situation where an impartial jury determined the value of that which was taken by the State of Indiana to be $432,600.00, after a three day jury trial, occurring almost two years after the trial court correctly determined that a taking had taken place, which decision by the trial court was not appealed, although it was a final appealable judgment and the Indiana Supreme Court had previously required litigants to appeal each court decision that a taking had or had not taken place?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceedings in both the Indiana Court of Appeals and subsequent denial by the Indiana Supreme Court of the *Petition to Transfer* filed by Petitioner, Lick Fork Marina, Inc., were Lick Fork Marina, Inc. and the State of Indiana (Department of Natural Resources).

There are no parent corporations of petitioner Lick Fork Marina, Inc. No publicly held corporation owns 10% or more of the stock of Lick Fork Marina, Inc.

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6 P. Nichols, Eminent Domain § 25.41
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OPINIONS BELOW

The Opinion-For Publication of the Indiana Court of Appeals is reported at 820 N.E. 2d 152 (2005) (*Pet. App.*, pp. 3a-13a) and the Decision Without Opinion of the Indiana Supreme Court denying transfer is reported at 2005 Ind. LEXIS 405. (*Pet. App.*, pp. 1a-2a). The Judgment of the Trial Court determining a taking occurred dated October 8, 2001 is found in *Petitioner's Appendix* on pages 19a-30a.

JURISDICTIONAL STATEMENT

The Order of the Indiana Supreme Court denying transfer of the judgment of the Indiana Court of Appeals was entered on April 28, 2005. The jurisdiction of this Court is requested pursuant to 28 U.S.C. §1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Fifth Amendment to the United States Constitution* applicable to the states through the *Fourteenth Amendment to the United States Constitution*, mandates in its entirety:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

> indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The *Fourteenth Amendment to the United States Constitution, Section 1*, requires:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall; abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a case in which after bench trial held October 8, 2001, the trial court determined a taking without just compensation in violation of the Indiana and U.S. Constitutional prohibitions thereto occurred by the State of Indiana. Only until after a three day jury trial on damages almost two years later as a result of the unconstitutional taking did the State of Indiana appeal the judgment of the trial court determining a taking occurred to the Court of Appeals of Indiana.

The inverse condemnation proceedings below arose as follows: The Patoka Lake Project is a joint reservoir project between the State of Indiana and the United States Department of the Army. (*Pet. App.* p. 41a).

The State of Indiana, Department of Natural Resources (Hereinafter "DNR") prepared and advertised a Prospectus for a marina and related facilities in the Lick Fork area of Patoka Lake, in 1979. A Lease Agreement was executed between DNR as Lessor and the Petitioner, Lick Fork Marina, Inc. (Hereinafter "Lick Fork" or "Petitioner") as Lessee on April 29, 1980 and provides in relevant part:

> Section 14.03 Title to Property.
>
> Title to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee. (*Pet. App.*, p. 40a).

The Lease provided that Lick Fork paid rent to DNR and DNR received a percentage of Lick Fork's gross income. (*Pet. App.*, pp. 38a-40a, Sections 3.02 and 3.03).

During the course of the leasehold, Lick Fork constructed on the leasehold a marina building, radio tower, birdhouse poles, wire propane pen, one gazebo, octagonal wood deck, landscaping, established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap (hereinafter

referred to as the "*Items Condemned*"). (*Pet. App.* p. 83a-89a [p. 50, ll. 21-25; p. 51, ll. 2-4; p. 52, ll. 2-8; p. 55, ll. 20-24; p. 56, ll. 12-17; p. 57, ll. 8-9; p. 57, ll. 11-15; p. 58, ll. 7-17; p. 60, ll. 20-23; p. 61, ll. 2-4; p. 83, ll. 3-7]). Lick Fork paid for all the Items Condemned and the DNR paid nothing. (*Pet. App.*, p. 80a [p. 29, ll. 22-25; p. 30, l. 2]; pp. 88a-89a [p. 83, ll. 3-7]).

Elected Assessor Allen Thewes testified at the bench trial determining a taking occurred that Lick Fork paid personal property taxes on the Items Condemned. (*Pet. App.*, p. 79a [p. 15, ll. 2-4; p. 22, ll. 7-11]). All in-ground fuel storage tanks were registered with the Indiana Department of Environmental Management as the property of Lick Fork, and not DNR. (*Pet. App.*, pp. 82a-83a [p. 39, ll. 9-22]; pp. 95a-102a). In December, 1999, *prior to the expiration of the Lease Agreement as extended*, the DNR made an offering to the public to make proposals on what was Lick Fork Marina which included the Items Condemned. (*Pet. App.*, pp. 79a-80a [p. 27, ll. 2-5]).

On October 9, 2000 Lick Fork gave written notice to DNR that the Items Condemned were the property of Lick Fork. (*Pet. App.*, pp. 42a-45a). Also at a meeting held January 11, 2001, Lick Fork made clear to DNR that the Items Condemned had been paid for and erected by Lick Fork and were the property of Lick Fork. (*Pet. App.*, pp. 80a-82a [p. 36, ll. 20-22; p. 38, ll. 6-23]). A letter of January 18, 2001, also made clear that ownership. (*Pet. App*, pp. 46a-48a). On February 6, 2001, DNR gave written notice to Lick Fork to vacate the premises no later than March 31, 2001, mandating: "All personal property is to be removed by that date; any personal property remaining thereafter shall become the property of the State of Indiana." (*Pet. App.*, p. 49a).

Seventeen days later, on February 23, 2001, Chief of Staff and General Counsel for the DNR by letter mandated to Petitioner Lick Fork that the Items Condemned were considered by the State of Indiana to be the "property of the State of Indiana and are not to be removed." (*Pet. App.*, pp. 50a-51a). On March 1, 2001 Lick Fork through counsel wrote Doehrmann, as representative of the DNR, that the Items Condemned were the personal property of Lick Fork and that the action of the DNR constitutes a condemnation of those items. (*Pet. App.*, pp. 52a-55a). Ultimately, effective March 31, 2001, DNR leased the real estate together with all of the Items Condemned to Hoosier Hills Marina, Inc. (*Pet. App.*, pp. 79a-80a, [p. 27, ll. 2-5]).

Petitioner filed a *Complaint in Inverse Condemnation*, on April 19, 2001, alleging both violations of the Indiana and United States Constitution as follows: "Under both the Constitution of the State of Indiana and the Constitution of the United States, no person's property can be taken for a public purpose without just compensation." (*Pet. App.*, p. 47a-*Exhibit 3 of Complaint in Inverse Condemnation and incorporated therein*). On August 30, 2001, the Trial Court held a bench trial on Lick Fork's *Complaint In Inverse Condemnation*. (*Pet. App.*, p. 56a; p. 60a).

The Lease between the U.S. Army Corps. of Engineers as Lessor and DNR as Lessee for all Patoka Lake property beginning July 31, 1979 was entered into evidence at the bench trial determining a taking by inverse condemnation of the Items Condemned occurred. The Lease was at that time in full force and effect as to the rights of the State of Indiana and the Petitioner. (*Pet. App.*, p. 41a).

It is uncontroverted that the U.S. Army Corps of Engineers has not transferred any rights to the DNR to the